Supreme Court, U.S.
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In The
Supreme Court Of The United States

STEW LEONDARD'S,
Petitioner,

v.

ANN M. VENEMAN, UNITED STATES SECRETARY OF AGRICULTURE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. The Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. §601 et. seq., authorizes the Secretary of Agriculture to issue orders governing the handling of milk and dairy products through a system of marketing orders applicable to a designated region of the country to insure a sufficient quantity of pure and wholesome milk to meet current needs. The marketing orders create a market-wide pricing pool for handlers of milk in order to achieve equality among producers. Entities that both produce and handle their own milk are classified as "producer-handlers" and are not regulated because a producer-handler sells what it produces and does not buy milk from other sources so as to shift onto them the burden of carrying reserves of use when milk production is at a low. In light of the stated policy of the AMAA to insure a sufficient quantity of pure and wholesome milk, should a handler that leases a local farm for the purpose of maintaining direct control over both the production and sale of its own milk products in order to address growing health concerns expressed by the public about the purity and wholesomeness of milk and dairy products being sold and consumed, be accorded producer-handler status under the AMAA?

II. The Secretary of Agriculture's interpretation of the definition of a "producer-handler" impacts the entire regulatory system for all milk produced, sold and consumed in the United States. The Northeast Marketing Area alone includes all of the States of Connecticut, Delaware, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont and the District of Columbia, as well as most of the counties and cities in the States of Maryland, New York, Pennsylvania and Virginia. Considering the vast impact that the Secretary of Agriculture's interpretation of the definition of producer-handler

will have on the Northeast Marketing Area and the need for uniform application of the milk regulation scheme embodied by the AMAA, should a handler that leases a local farm to address growing health concerns expressed by the public about the purity and wholesomeness of milk being produced and sold, be accorded producer-handler status?

LIST OF PARTIES

The petitioner, Stew Leonard's Dairy ("Stew Leonard's"), was the petitioner-appellant in both the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit.

Daniel Glickman, United States Secretary of Agriculture, was the respondent-appellee in the United States District Court for the District of Connecticut. After the initiation of the petitioner's action in the District Court, the respondent, Ann M. Veneman, replaced Daniel Glickman as Secretary of Agriculture and was automatically substituted for Secretary Glickman as the respondent-appellee in the petitioner's appeal to the United States Court of Appeals for the Second Circuit.

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, Stew Leonard's discloses that it does not have any parent corporations and is privately held.

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OPINIONS OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated April 3, 2002, is reported at 2002 U.S. App. LEXIS 5973 (2d Cir. (Conn.)), and is printed in the appendix to this petition at (A-1).

The opinion of the United States District Court for the District of Connecticut, Smith, J., U.S. Magistrate, is reported at Stew Leonard's v. Glickman, 199 F.R.D. 48 (D. Conn. 2001), and is printed in the appendix to this petition at (A-5).

JURISDICTION

The United States Court of Appeals entered judgment on April 3, 2002. The petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). This petition is filed within ninety days of the Court of Appeals' decision dated April 3, 2002. 28 U.S.C. § 2101(c)

STATUTORY AND REGULATORY PROVISIONS

[REPRINTED IN APPENDIX]

STATEMENT OF THE CASE

A. The Underlying Regulatory Scheme Of The AMAA

The AMAA gives the Secretary for the United States Department of Agriculture ("Secretary") the authority to issue orders governing the handling of agricultural commodities, including milk, through a system of marketing orders applicable to a designated region. One such region is the Northeast Marketing Area, which covers all milk produced, sold and consumed in all of the States of Connecticut, Delaware, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont and the District of Columbia, as well as most of the counties and cities in the States of Maryland, New York, Pennsylvania and Virginia. One of the goals of the AMAA is to "insure a sufficient quantity of pure and wholesome milk to meet current needs." See 7 U.S.C. § 608c(18). (A. 82-83; 137-138). The Department of Agriculture's own brochure also makes clear that the objective of the Federal milk orders is to assure consumers "of an adequate supply of pure and wholesome milk." (A. 82-83). The provision of pure and wholesome milk to satisfy the public's demand is met through a milk pricing scheme embodied by the AMAA, 7 U.S.C. § 608c, which was intended in part to discourage cutthroat competition by milk producers trying to sell their milk for use as fluid milk, which commands a higher price than milk used for other purposes. (A. 59-60; 109). To achieve equality among producers of milk, the marketing orders create a market-wide pricing pool for handlers.[1]

Entities that are classified as producer-handlers are exempt from regulation. Producer-handlers are not

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[1] A "producer" is a person or entity who collects the milk directly from the animals, and a "handler" is a person or entity who takes this milk and turns it into an end product, and then resells it to either consumers or manufacturers.

regulated, and do not make equalization payments, because "their regulation was not necessary to achieve the declared policy of the Act." (A. 110). That is because a producer-handler sells what it produces, and does not buy milk from other sources so as to shift onto them to burden of carrying reserves for use when milk production is low. (A. 110-111). The "economic theory of the 'producer-handler' exemption is that the 'producer-handler' is a self-contained production, processing and distribution unit which does not share its Class I milk utilizations with the other producers supplying milk to the area, and does not count on the other producers to meet any of its needs." (A. 110).

B. Background Of Petitioner

Stew Leonard's is a family owned and operated milk and grocery business that traces its roots to the purchase of a 207-acre farm in 1864 by Stew Leonard Jr.'s great-great-grandfather, and the opening of a dairy store in Brooklyn, New York, in the 1890s. Stew Leonard's processes and packages milk and sells milk and food, primarily specialty items, from grocery stores in Norwalk and Danbury, Connecticut. (A. 42-43). Today, Stew Leonard's consists of a milk processing facility and retail store in Norwalk, Connecticut, where glass walls permit customers to watch raw milk, delivered from the farm that morning, as it is pasteurized, homogenized, packaged and transferred to shelves where they can buy it. (A. 99).

Stew Leonard's receives approximately two-thirds of a tanker truck of milk each day, "which is substantially less than its larger competitors, some of which take in hundreds of tanker trucks of milk per day." (Id.) Stew Leonard's sells approximately 1.2 million gallons of milk per year, "which is substantially less than its larger competitors such as the Stop & Shop Supermarket Companies, which sell 40 million gallons of milk per year." (Id.)

C. Petitioner's Request For Producer-Handler Status

In recent years, Stew Leonard's employees have noticed a growing concern among shoppers regarding impurities in food, including hormones and other unnatural additives fed to cows, antibiotics that make their way into milk after being administered to sick cows, and chemical and pesticide residues on produce. (Id.) Customers have been particularly concerned about the presence in milk of RBST, a recently developed synthetic protein that increases a cow's milk production. Partly in response to these concerns, Stew Leonard's entered into a lease with a dairy farm known as the Bahler Oakridge Farm ("Oakridge Farm") in Ellington, Connecticut, on December 10, 1997, for the purpose of maintaining direct control over both the production and sale of its milk products and thereby becoming a producer-handler of milk, as defined under the federal regulations, 7 C.F.R. § 1001.10. (A. 100).

In December 1997, Stew Leonard's requested that the market administrator for the New England Marketing Order[2] classify Stew Leonard's as a producer-handler under the order because of the lease Stew Leonard's executed with Oakridge Farm. (A. 10-12). In response, the market administrator for the New England Marketing Area, Erik F. Rasmussen, sent a letter dated December 30, 1997, to Stewart J. Leonard stating that "the versions of the proposed lease agreement" that had been provided to him failed to meet the producer-handler requirements of 7 CFR §1001.10. (A. 44-45). On January 5, 1998, counsel, on behalf of Stew Leonard's, sent a letter to the market administrator along

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[2] Since the initiation of the administrative proceedings, the Department of Agriculture has amended the nation-wide system of marketing orders by reducing the total number of marketing orders throughout the nation. See Milk in the New England and Other Marketing Areas; Order Amending the Orders, 64 Fed. Reg. 47898 (Sept. 1, 1999). Under this reorganization, the former New England Marketing Order became part of the Northeast Marketing Area. See 7 C.F.R. § 1001.2 (2000).

with a copy of the lease agreement requesting that the market administrator advise in what respects the lease failed to meet the requirements of the federal order. (A. 46-47). Thereafter, Stew Leonard's received a letter from the market administrator dated January 15, 1998, which states that the agreement in paragraph 3 of the lease "to review and adjust the payments called for herein on a quarterly basis," eliminates that risk of loss that is "inherent to a producer-handler's operation." (A. 47-48). The January 15, 1998 letter further states that "the fixed amount and the frequency of the management fee to be paid to Bahler Farms, Inc., by Stew Leonard's (also noted in Paragraph 3) must be specified in the lease." (A. 48).

On January 20, 1998, in response to the market administrator's January 15, 1998 letter, Stew Leonard's, through counsel, forwarded to the market administrator a revised draft lease in which a fixed management fee of $2,000.00 per month is specified in the lease. (A. 48-49). The revised draft lease also included the removal of the entire sentence contained in paragraph 3 that was quoted as unsatisfactory in the market administrator's January 15, 1998 letter. (Id.) The revised draft lease provided for the removal of the following sentence: "The parties hereto recognize the uncertainties that relate to the cost of farming and thereby agree to review and adjust the payments called for herein on a quarterly basis." (Id.)

By letter dated February 6, 1998, the market administrator declined to re-classify Stew Leonard's as a producer-handler. (A. 49-50). In that letter the market administrator states: "There is precedent by this office to approve farm leases for a producer-handler. (A. 50). These approvals follow the needs of currently operating producer-handlers to utilize additional sites for expansion purposes." (Id.) The February 6, 1998 letter further states that Stew Leonard's must continue to file handler reports as a pool

distributing plant because a "determination has been made that the means you propose to meet the producer-handler qualification under Section 1001.10(a) violate the letter and intent of the Act." (Id.) The letter refers to 7 U.S.C. 608c(15)(A) for a further decision. (Id.)

On June 16, 1998, Stew Leonard's entered into a revised lease agreement with Oakridge Farm (the "Lease"). (A. 50-52; 134-136). Under the Lease, Stew Leonard's leases the farm, cows and equipment and receives its raw milk from Oakridge Farm. (A. 134-136). Stew Leonard's also leases the entire herd of milking cows (approx. 550 cows) and the production facilities of Oakridge Farm, including its barns, milking parlors, personal property and all equipment necessary to produce milk. (A. 135). Stew Leonard's further agreed to replace culls and/or attrition with newly bred heifers. (Id.) Under the Lease, Stew Leonard's also pays a monthly management fee and "all ordinary and necessary expenses related to the production, processing and packaging of milk." (A. 105; 135). Stew Leonard's also assumes pursuant to the Lease "all risk, responsibilities and maintenance of the cows, equipment, buildings and labor" of the farm. (Id.) The terms of the Lease state that these risks and responsibilities include, but are not limited to, "life and death of all animals, damage and destruction resulting from acts of God (including storms, fires, pestilence, drought, etc.), damage and destruction resulting from employee negligence and/or malfeasance." (A. 135). The Lease further removed certain provisions of the prior lease concerning insurance and termination of the lease. (A. 134-136). Notwithstanding revised terms and conditions of the Lease, by letter dated July 31, 1998, the market administrator stated that review of the Lease and the Grade A Milk Production License from the State of Connecticut "has not altered the determination of February 6 that Stew Leonard's Dairy is not a producer-handler." (A. 53-54).

On February 13, 1998, Stew Leonard's instituted administrative proceedings with the Secretary by filing a petition seeking relief from the market administrator's decision to deny Stew Leonard's producer-handler status as that status is defined in Federal Milk Order No. 1, 7 C.F.R. § 1001.10 et seq. (A. 15). Stew Leonard's later amended its petition and requested that the Secretary confirm Stew Leonard's designation as a producer-handler and further requested that the Secretary declare Stew Leonard's is not required to file handler reports or comply with all other requirements of a handler under the federal statutes, regulations and milk orders. (A. 16). At the time Stew Leonard's instituted the administrative proceedings in 1998, a producer-handler was defined in the regulations in pertinent part as follows:

> any person who, during the month, is both a dairy farmer[3] and a handler and who meets all of the following conditions:
>
> (a) Provides as the person's own enterprise and at the person's own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler's own plant, and to distribute it as route disposition.

7 C.F.R. § 1001.10.[4] (A. 12-13; 141-142).

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[3] The market administrator admitted under oath that the term "dairy farmer" is not defined anywhere in the regulations. (A. 127). The administrator has the sole power, without regulatory guidance, to decide what is and is not a dairy farmer. By failing to define a critical term within the definition of "producer-handler," the regulations themselves cede unlimited arbitrary authority to the administrator.

[4] Because the market administrator based his decision only on section (a) of the definition of a producer-handler, as discussed below, other sections of the definition are not relevant here.

On January 11 and 12, 1999, the parties presented evidence before an administrative law judge. (A. 16). At the hearing, the market administrator testified that he denied the petition of Stew Leonard's because, he asserts, Stew Leonard's does not operate Oakridge Farms as Stew Leonard's own enterprise and at Stew Leonard's own risk. When asked to identify a risk that Stew Leonard's had not assumed, the market administrator testified that, as an example, dairy farmers in Georgia inadvertently spread toxic sludge on their fields, taking the land out of production for an indefinite period, contaminating feed grown on the land, and possibly affecting the distant offspring of the cows by some genetic corruption.

On September 10, 1999, the administrative law judge issued a Decision and Order dismissing Stew Leonard's Petition and affirming the decision of the market administrator. (Id.) On October 12, 1999, Stew Leonard's appealed the administrative law judge's Decision and Order to the Secretary, who, through a designated Judicial Officer, issued a final Decision and Order on March 16, 2000 dismissing Stew Leonard's Petition and also specifically revising some of the administrative law judge's earlier findings of fact. (Id.)

On April 4, 2000, Stew Leonard's brought an action in the United States District Court for the District of Connecticut pursuant to the judicial review provision of the AMAA, 7 U.S.C. § 608c(15)(B), against the Secretary, seeking reversal of the Secretary's March 16, 2000 decision to deny Stew Leonard's "producer-handler" status under Federal Milk Order No. 1, 7 C.F.R. §§ 1001 et seq. On March 21, 2001, the District Court denied Stew Leonard's cross motion for summary judgment and granted the Secretary's cross motion for summary judgment. (Id.) The District Court held that Stew Leonard's failed to demonstrate that the

Secretary's decision to deny it producer-handler status under the applicable regulations was arbitrary and capricious and not supported by substantial evidence, and, therefore "not in accordance with the law" pursuant to 7 U.S.C. § 608(c)(15)(B). (A. 34). Further, the District Court held that Stew Leonard's has not shown that the Secretary's application of the statutory scheme lacks a rational basis.

On May 8, 2001, Stew Leonard's appealed to the United States Court of Appeals for the Second Circuit, which had subject matter jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 because it was an appeal from a final judgment of the United States District Court for the District of Connecticut. On April 3, 2002, the Court of Appeals affirmed the District Court's decision.

D. Producer-Handler Classification

Since the initiation of the administrative action in 1998 and prior to the Secretary's final Decision and Order dismissing Stew Leonard's petition, the definition of a producer-handler under 7 C.F.R. § 1001.10 changed. (A. 13-14). The new text deletes the requirement that a producer-handler be *"both a dairy farmer and a handler"*, and now reads in pertinent part as follows:

> Producer-handler means a person who:
>
> (a) Operates a dairy farm and a distributing plant from which there is monthly route disposition in the marketing area during the month; [and]
>
> * * * *
>
> e) Provides proof satisfactory to the market administrator that the care and management of the dairy animals and other resources necessary to produce all Class I milk handled (excluding receipts

> from handlers fully regulated under any Federal order) and the processing and packaging operations are the producer-handler's own enterprise and at its own risk.

7 C.F.R. § 1001.10 (emphasis added). (A. 140). The effect of the new regulation is that the term "dairy farmer", a critical term which the Secretary relied upon in denying Stew Leonard's classification as a producer-handler, is no longer a required status of a petitioner requesting designation as producer-handler. (Id.)

REASONS FOR GRANTING THE WRIT

This petition for certiorari raises two important questions of statutory and regulatory law that have not been decided by this Court and almost never reach this level of review. These issues are of great national significance because they impact all milk produced, sold and consumed in the United States. One such region affected by these issues is the Northeast Marketing Area, which includes all of the States of Connecticut, Delaware, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont and the District of Columbia, as well as most of the counties and cities in the States of Maryland, New York, Pennsylvania and Virginia. A ruling from this Court will address the health concerns of thousands of consumers throughout the country about the purity and wholesomeness of milk and other dairy products being sold. Public health concerns about the undetectable additive RBST as well as bacteria and other impurities, such as hormonal additives and antibiotics in milk and other dairy products are issues of great importance to the nation's welfare.

First, the Secretary's narrow interpretation of the definition of a producer-handler does not advance the goals

of the statute, and in fact undermines one goal of the statute, which is to provide *pure* and *wholesome* milk. The Secretary's overly technical rulings discourage the production of milk which is of a far higher standard of quality, well above the minimum acceptable standards set by the Department of Agriculture, and higher than milk that can be purchased from dairy cooperative. The high quality of Stew Leonard's milk is a direct result of Stew Leonard's lease of Oakridge Farm, which allows Stew Leonard's to control the herd from which the milk comes and eliminate the additives which affect the quality of the milk produced. The Secretary's construction of the statute and regulation effectively seeks to penalize Stew Leonard's by making it bear the cost of a regulatory program even though such regulation of Stew Leonard's – a self-contained enterprise that simply produces milk and sells it at retail – would not serve the purposes of the program. The impact of the Secretary's decision is certainly not limited to this case, and can be expected to influence the production of all milk sold and consumed within the Northeast Marketing Area as well as perhaps throughout the country.

Second, the Secretary's interpretation of the definition of a producer-handler in this and other cases is so inconsistent in theory as to leave the intent and meaning of the statutes and regulations in a state of confusion. The Secretary's decision, which failed to take into account the newly amended definition of a producer-handler, provides absolutely no guidance to parties subject to the milk regulatory scheme embodied by the AMAA as to the true construction of the regulation. Further, the Secretary's determination conflicts with the decisions in other cases, in which producer-handler status was granted to entities that bore demonstrably less risk in connection with farming than does Stew Leonard's.

I. THE SECRETARY'S NARROW INTERPRETATION OF A PRODUCER-HANDLER UNDERMINES THE AMAA'S GOAL OF PRODUCING PURE AND WHOLESOME MILK TO THE GENERAL PUBLIC

This Court has never decided an important question that is likely to impact all milk produced, sold and consumed throughout the country: can the Secretary ignore the very charge imposed upon her by Congress in the statute - to provide pure and wholesome milk to the public - by denying producer-handler status to a handler that leases a local farm for the purpose of maintaining direct control over both the production and sale of its own milk products in order to address growing health concerns expressed by the public about the purity and wholesomeness of milk and other dairy products? Here, the Secretary's rulings undermine this goal through overly technical rulings, which only result in the production and distribution of poorer quality milk to the consumer. Such rulings will undoubtedly have an adverse impact on the purity and wholesomeness of milk and dairy products produced and consumed in the Northeast Marketing Area as well as throughout the country.

The Secretary's chosen interpretation conflicts with the governing statute. The Secretary's narrow interpretation of the definition of a producer-handler does not advance the goals of the statute, and in fact undermines the goal to provide *pure* and *wholesome* milk. One purpose of milk pricing regulations at issue here is to "insure a sufficient quantity of *pure* and *wholesome* milk to meet current needs." 7 U.S.C. § 608c(18) (emphasis added). The Department of Agriculture's own brochures make the same point. The objective of the Federal milk order program is to assure consumers "of an adequate supply of *pure* and *wholesome* milk." (A. 82-83).

All of the evidence demonstrates that what Stew Leonard's does is produce pure and wholesome milk by controlling the herd from which the milk comes from and eliminating the additives that affect the quality of the milk produced. The Secretary effectively seeks to penalize Stew Leonard's by making it bear the cost of a regulatory program even though such regulation of Stew Leonard's - a self-contained enterprise that simply produces milk and sells it at retail - would not serve the purposes of the program. The Secretary seeks to bring Stew Leonard's back into the fold, by requiring Stew Leonard's to resume purchasing lower quality milk from the dairy cooperative that once supplied its milk, and Oakridge Farm would resume selling its high-quality milk to the dairy cooperative to be blended with and diluted by the lower-quality milk of other farms.

The market administrator testifies that he is unconcerned with the quality of milk as long as it meets the minimum standards to be classified as Grade A. However, the market administrator's and the Secretary's decisions must "tend to effectuate the declared policy of the Act" under which they are acting. In re Mil-Key Farm, Inc., 54 Agric. Dec. 26, 59 (U.S.D.A. 1995). Here, their decision undermines a significant goal of the act - the production of *pure* and *wholesome* milk. The decision effectively discourages the production of milk that is of a higher quality than minimal government standards.

The Secretary's actions with respect to Stew Leonard's undermine the AMAA's objective of providing pure and wholesome milk to consumers. The administrative law judge found that milk produced by Stew Leonard's at Oakridge Farm is of a far higher standard of quality, well above the minimum acceptable standards set by the Department of Agriculture, and higher than milk that can be purchased from dairy cooperative. (A. 106-107). The

high quality of Stew Leonard's milk is a direct result of Stew Leonard's decision to lease Oakridge Farm and obtain all its milk from there. (A. 106-107). The reasoning of the District Court is that conferring producer-handler status on Stew Leonard's would only serve to promote the production of wholesome milk at the lowest possible cost, which is not the intended purpose of the Act. (A. 22-23). This line of reasoning, however, is flawed in its own right because, as the administrative law judge found, Stew Leonard's entered into its lease with Oakridge Farm for legitimate reasons and was not engaging in a sham lease merely to circumvent the milk marketing regulations. See Kreider Dairy Farms, Inc. v. Glickman, No. Civ.A.95-6648, 1996 U.S. Dist. LEXIS 12094, at *9 (E.D. Pa. Aug. 15, 1996) (producer-handler status upheld where petitioner's customers required kosher milk because of religious concerns, other suppliers could not simply fill any shortage in production).

Here, like the petitioner in Kreider Dairy, Stew Leonard has entered into a lease to address the concerns of its customers with regard to the milk being produced and sold. Stew Leonard's leased Oakridge Farm in part "for the purpose of maintaining direct control over both the production and sale of its milk products." (A. 100). The decision to lease the farm was partly a response to growing concerns expressed by customers in recent years about impurities, such as hormonal additives and antibiotics in milk and other foods. (A. 7; 16). Conferring producer-handler status would enable Stew Leonard's to effectively address its customer's concerns, because only then, could Stew Leonard's maintain complete control over both the production and sale of its milk products. In addition, the lease of Oakridge Farm allows Stew Leonard's to receive its milk daily from the farm, within as little as six hours after milking, and to advertise that its milk comes from a single farm and is free of the undetectable additive RBST. (A. 107). Stew Leonard's "can be certain its milk is free of RBST only

by taking over the farm, paying all the bills, and removing any incentive for the farmer to artificially increase the herd's production." (A. 120). The milk produced at Oakridge Farm is "substantially better in quality than milk that can be obtained from dairy cooperatives," being lower in bacteria and with a longer shelf life. (A. 106). Because the cows at Oakridge Farm are in "exceptional good health," Stew Leonard's has not had to reject Oakridge Farm milk because of the presence of antibiotics, as Stew Leonard's did have to do on occasion prior to leasing Oakridge Farm. (A. 107).

If anything, the Secretary should be standing beside Stew Leonard's advocating his efforts to provide pure and wholesome milk to the consumers, which is the very charge imposed on her by Congress in the statute. Instead, she and her predecessors seek to thwart this goal by overly technical rulings, which only result in the production and distribution of poorer quality milk to the consumer. Accordingly, this Court should grant the petition for certiorari to determine whether such a narrow interpretation of the producer-handler exemption does, in fact, undermine the goal of the AMAA to produce pure and wholesome milk.

II. THE SECRETARY'S INTERPRETATION OF THE DEFINITION OF A PRODUCER-HANDLER IN THIS AND OTHER CASES IS SO INCONSISTENT IN THEORY AS TO LEAVE THE INTENT AND MEANING OF THE STATUTES AND REGULATIONS IN A STATE OF CONFUSION

This Court has never decided the important question which impacts the health concerns of the general public: considering the vast impact that the Secretary of Agriculture's interpretation of the definition of producer-handler will have on the Northeast Marketing Area and the need for uniform application of the milk regulatory scheme embodied by the AMAA, should a handler that leases a

local farm to address growing health concerns expressed by the public about the purity and wholesomeness of milk being produced and sold, be accorded producer-handler status? The Secretary's interpretation of the definition of a producer-handler in this and other cases is so inconsistent in theory as to leave the intent and meaning of the statutes and regulations in a state of confusion. A ruling from this Court will provide the courts, the Secretary and the parties subject to the milk regulatory scheme embodied by the AMAA with the necessary instruction and guidance when addressing this issue.

The Secretary, in her final Decision and Order, relied upon the regulation's undefined term "dairy farmer" in denying Stew Leonard's classification as a producer-handler. However, after the initiation of the petitioner's administrative proceedings in 1998, but before the Secretary issued her final decision, the definition of a producer-handler under 7 C.F.R. § 1001.10 changed. The effect of the change now deletes the requirement that a producer-handler be *"both a dairy farmer and a handler."* The widespread impact of the Secretary's decision to depart from the stated requirements of the regulation is so inconsistent with the intent and meaning of the regulation that it leaves parties subject to the milk regulatory scheme embodied by the AMAA without the necessary guidance on which to act.

The Secretary's decision is flawed for a second, more troubling reason. The underlying explanation for the decision is patently disingenuous and contrary to prior decisions in other cases involving leases. During the proceedings, the market administrator testified that he denied the petition of Stew Leonard's because, he asserts, Stew Leonard's does not operate Oakridge Farms as Stew Leonard's own enterprise and at Stew Leonard's own risk. Tr. at 263 (*"I cannot envision, nor could I compose, a lease that*

would encompass sole enterprise and sole risk for 100 percent of production . . . .") & 264 ("*I concluded that all the capital risk and financial risk of the assets were not borne by Stew Leonard, even if in the lease it says all risks.*") (emphasis added). The underlying reasoning, however, conflicts with the Secretary's decisions in other cases, in which producer-handler status was granted to entities that bore demonstrably less risk in connection with farming than does Stew Leonard's. In fact, the uncontroverted evidence introduced at the hearing demonstrated that at least three entities have been *granted* producer-handler status even though they bear *demonstrably less risk* for farms they lease than does Stew Leonard's. "The Administrator concedes, these lessees do not operate their leased farms as their own enterprise, and do not assume the full risks of producing milk at the leased farms." (A. 55-56; 108).

The instances in which farm lessees have been granted producer-handler status demonstrate the disingenuous nature of the Secretary's and the market administrator's claimed rationale. In one instance, a farmer and dairy operator retained its producer-handler status despite the existence of three leases pursuant to which the dairy "will be leasing [redacted] head of cattle . . . and [redacted] cattle barn(s)" and "will be responsible for all bills related to the feed, health care and management of the said [redacted] cattle." (A. 75). Each lease was terminable by either party on 30 days notice. (A. 75). The leases said *nothing* about many risks associated with the farms, such as the risk that cows might perish, or that employees might cause harm, or that acts of God might cause damage. (A. 75). Rather, the dairy was responsible to pay only for feed, health care and management. (A. 75).

The market administrator testified that a dairy such as the one involved in the leases in PX9(a)-(c) could obtain up to *twenty-five percent* of its milk by way of such leases

without jeopardizing its producer-handler status.[5] (A. 75-75; 130). "Therefore, the dairy would be escaping significant risks relating to up to one quarter of the farm operation that supplies its milk. If toxic sludge contaminated the feed of one quarter of the cows that provide the dairy with milk, causing genetic mutations that made all future generations unsuitable for milking, the dairy would escape absolutely free of charge or care." (A. 130-131). If the market administrator were truly concerned that a lessee such as Stew Leonard's might escape the consequences of a hypothetical toxic sludge spill and therefore had not assumed the full risks of farming, then the market administrator should not have permitted the lessee in PX9 to be recognized as a producer-handler.[6]

The administrative law judge was similarly skeptical of other leases found by the market administrator to convey producer-handler status. One such lease "simply 'assigned and transferred' milk produced on a farm to the dairy that was leasing the cows." (A. 130-131). The administrative law judge quoted the following testimony, a question posed to the market administrator on cross-examination:

> Q: So, for the purposes of this farmer to farmer lease, you don't care if the producer handler actually produces the milk. Right?

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[5] The market administrator conceded that there is no authority in the regulations for the 25-percent figure, and that his office simply made it up. Tr. at 314. This is another example of the arbitrary way in which the market administrator conducts himself, even when it does not involve Stew Leonard's.

[6] In fact, Stew Leonard's *has* assumed the risk of a toxic sludge spill at Oakridge Farm. If some genetic corruption during the term of the Stew Leonard's lease becomes apparent generations later -- and can be traced to Stew Leonard's tenure – then Stew Leonard's would be responsible. In this respect, Stew Leonard's is no different from any *owner* of a farm or cows, who might sell a herd and learn of genetic corruption generations later.

A: That's correct.

(A. 130-131). The administrative law judge found as a matter of fact that "There is *not even any pretense* that the producer is operating the farm - responsible for up to 25 percent of the producer's milk - as the producer's own enterprise or at the producer's own risk." (A. 131) (emphasis added).

In the third questionable lease, "the lessee assumed the risk of loss or damage to milk, and also agreed to indemnify the lessor against liability for injuries to workers, but did not otherwise assume the risks of operating the farm." (A. 75-76; 131). The market administrator conceded that the lessee had not assumed the full risks of operating the subject farm but was nevertheless granted producer-handler status. (A. 75-76; 131).

In light of the market administrator's testimony, the administrative law judge determined that Stew Leonard's does in fact bear risks that the farmers with the leases described above do not. Because Stew Leonard's bears considerably *more* risk of operating its farm than the farm lessee in PX9,[7] the market administrator could not rationally have concluded that the dairy operator in PX9 should receive producer-handler status but that the Stew Leonard's petition should be denied *on the basis of inadequate risk*. In fact, the market administrator concedes that the farmers with the approved leases are accorded producer-handler status even though they *do not* bear the full risk of farming, despite the regulation requiring that they do. (A. 129-130).

The market administrator justifies this favored treatment by stating that he permits "producer-handlers" to lease cows to supplement their milk production, but only if they already qualify as producer-handlers to begin with,

[7] Stew Leonard's in fact bears all risks of operating its farm.

and that such producer-handlers are permitted to obtain no more than 25 percent of their milk from such leased cows. (A. 123-24). The market administrator concedes, however, that no regulation says an existing producer-handler can lease cows and remain a producer-handler even though no longer carrying the risk of *twenty five percent* of the farming operation. (A. 129). This unannounced, unrecorded regulation is ascribed simply to "administrative discretion" and is not supported by substantial evidence. (A. 129). That is the classic definition of arbitrary and capricious administrative decision making.

Here, the result of the market administrator's act of "discretion" is that Stew Leonard's is denied producer-handler status because it allegedly has not assumed the full risk of farming, but that other dairy operators who have assumed demonstrably *less* risk *are* nevertheless accorded producer-handler status. The market administrator claims justification by pointing out that lessees who have been granted producer-handler status were producer-handlers before they entered into their leases, or that they do not obtain all their milk from leased farms. These distinctions have no discernible relation to any purpose of the milk pricing regulations. There can be no rational basis for a decision that certain enterprises should be granted a substantial benefit, even though they do not qualify, on the ground that *they used to qualify for the benefit.* Even the administrative law judge called into question the rationale for the administrator's distinctions.

> The market administrator justified such distinction by stating that the other leases were producer-handlers prior to entering into leases and that they are limited to acquiring twenty-five percent of their milk from leased cows. What factors if any, other than administrative discretion, went

> into arriving at a twenty-five percent figure is unclear from the record evidence. Supposedly, the figure could have been any figure: 10%, 20%, 27%, etc.

(A. 129-131).

The administrative law judge was troubled by the market administrator's unfettered power to decree who is a producer-handler and who is not. The administrative law judge found as a matter of law *"There are no standards nor measuring sticks against which his conduct and discretion can be measured. Those who are subject to his regulation have no way of ascertaining if the market administrator is acting within the scope of his designated duties."* (A. 122) (emphasis added). The administrative law judge quoted extensive excerpts from the hearing testimony in which the market administrator stated that "administrative discretion" permitted him to make determinations without guidance or legal constraint. The market administrator testified, for example, that a producer-handler could retain that status as long as it did not obtain more than 25 percent of its milk from a leased farm, but the 25-percent figure was simply plucked from thin air on the basis of "administrative discretion." (A. 124-131). *"[T]here is no express language in the statute nor regulations to support the making of such a distinction based upon 'administrative discretion.' . . . Lack of specificity in the regulations allow unlimited authority to the Market Administrator and provide fertile ground of uncertainty for those subject to his regulation."* (A. 132) (emphasis added).

Case law also establishes that a producer-handler can obtain 100 percent of its milk from a leased farm, which the producer-handler operates as its own enterprise and at its own risk. Such a result occurred in In re Jerome Klocker, 26 Agric. Dec. 1050 (U.S.D.A. 1967). There, the petitioner, a producer-handler, sold its 200 cows to one Rausch and then leased back the cows and hired Rausch as an employee to

feed, care for and milk the herd. Id. at 1051-53. The periodic payments due to Rausch were based on the gallons of milk produced, and Rausch was responsible to grow or raise feed, pay veterinarian expenses and hire other employees as needed. Id. at 1053. "During the period involved here, petitioner's *sole source of milk for use at his plant was this dairy herd*" leased from Rausch, except for two months in which the petitioner had to buy additional milk. Id. at 1055 (emphasis added). The judicial officer, finding that the petitioner qualified as a producer-handler, stated:

> Admittedly, *the use of milk from a leased herd is not determinative of the question of satisfaction of the requirements of the 'producer-handler' definition* contained in the order.[8] . . . Petitioner exercised the powers of management, supervision, direction and control of the dairy heard and farm and such farm was his investment or risk. *Surely, the producer-handler need not personally perform the physical acts incident to the production of milk.* This is not required with respect to the operation of the processing plant, as pointed out by petitioner. Further, petitioner has established herein, we believe, that Rausch was in reality as well as in form his employee.

Id. at 1057 (emphasis added). Even under the more stringent definition of producer-handler adopted during the period in question – requiring that the "maintenance, care

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[8] Jerome Klocker concerned Order No. 76, under which the definition of a producer-handler was modified during the time in question. The order first defined a producer-handler as "any person who operates a dairy farm and a distributing plant but who receives no milk from other dairy farmers or from sources other than pool plants." The order was amended to require that the "maintenance, care and management of the dairy animals and other resources necessary to produce the milk and the processing, packaging and distribution of the milk are *the personal enterprise and the personal risk* of such person." 26 Agric. Dec. at 1055-56 (emphasis added). The judicial officer found that the petitioner qualified as a producer-handler under either definition. Id. at 1057-58.

and management of the dairy animals . . . [be] the personal enterprise and risk of" the producer-handler - the petitioner still qualified as a producer-handler. Id. at 1058. Therefore, whether the petitioner leased his *entire* herd was not determinative of the outcome even under a producer-handler definition essentially the same as that in Order No. 1. Similarly, the petitioner in Jerome Klocker was entitled to employ a manager to take care of the herd even under the more stringent definition and still qualify for producer-handler status.

The petitioner in Jerome Klocker was a producer-handler prior to entering into the lease at issue there. Contrary to the judicial officer's conclusion, however, the decision in Jerome Klocker does not rely on this fact. The case cannot be read to support the market administrator's arbitrary and capricious determination, in the case at bar, that a producer-handler may lease cows and remain a producer-handler, while a handler may not lease cows and become a producer-handler. Rather, the decision in Jerome Klocker establishes that a bona fide lease of a herd that supplies 100 percent of milk processed by a handler *can* confer producer-handler status.

It is well recognized that there exists case law which also supports the proposition that a handler does not deserve producer-handler status if the handler merely engages in a sham transaction designed to circumvent the milk pricing regulations, or if the lessee fails to assume the risks of farming. See, e.g., In re Sherman Fitzgerald, 31 Agric. Dec. 593, 605 (U.S.D.A. 1972) ("In the past, elaborate and ingenious schemes have been employed to achieve apparent producer-handler status and thus to circumvent regulation."). However, these cases *do not* support the proposition that a dairy, which leases a farm, dictates the essential elements of the farm's management, and assumes the entire risk of farming, is nevertheless still not a

producer-handler. Stew Leonard's has uncovered no decision supporting the argument that a handler who obtains a farm by lease can never satisfy the "own enterprise" and "own risk" requirements of the producer-handler regulation, even where it directs how the farm is run, pays all costs, and assumes all risks. Further, the administrative law judge found, as a matter of fact, that Stew Leonard's was not engaging in a sham or maneuver like those described above. Indeed, the Secretary does not claim that Stew Leonard's does not claim that Stew Leonard's is engaged in a sham transaction or otherwise acting in bad faith.

As in Jerome Klocker, Stew Leonard's qualifies as a producer-handler because it produces its own milk, from a leased herd, and processes that milk in its own dairy. The fact that the cows are leased is not determinative, and neither is the fact that Stew Leonard's has hired members of the Bahler family as employees to oversee milk production on behalf of Stew Leonard's. See In re Jerome Klocker, 26 Agric. Dec. 1050, 1057 (U.S.D.A. 1967) ("Surely, the producer-handler need not personally perform the physical acts incident to the production of milk."). The cases discussed above support the common-sense proposition that a dairy that tries to circumvent the milk pricing regulations by claiming to lease or purchase a farm, while in reality simply buying milk, does not deserve producer-handler status.

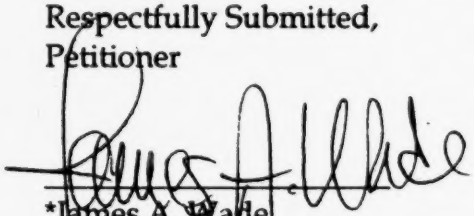
This Court should grant the petition for certiorari because this case presents a useful opportunity for this Court to instruct the courts, the Secretary of Agriculture and the parties subject to the milk regulatory scheme embodied by the AMAA as to the true intent and meaning of the statute and regulations.

CONCLUSION

This petition raises two important questions of statutory and regulatory law of great national significance that have never before been decided at this level. A ruling from this Court will impact all milk produced, sold and consumed within the Northeast Marketing Area as well as address the health concerns of thousands of consumers throughout the country about the delivery of pure and wholesome milk. This case presents a useful opportunity for this Court to instruct the courts, the Secretary of Agriculture and the parties subject to the milk regulatory scheme embodied by the AMAA with the necessary guidance when addressing these issues.

For all the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully Submitted,
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